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Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

Todd Guthrie

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Ninth Circuit

WRIT OF CERTIORARI

Todd Guthrie
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QUESTIONS PRESENTED

1. Does the dully enacted Paperwork Reduction Act of both 1980 and as strengthened, the 1995 Paperwork Reduction Act, and all of its protections for the public, apply to the Secretary's request for income tax information promulgated through request Form 1040 for year ending 2002?

2. If so, does the request for income tax information comply with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512(a)(1995)?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties in the case below.

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PETITION FOR WRIT OF CERTIORARI

Todd Guthrie respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit, reversing its decision, as well as setting aside its decision in *United States v. Hicks*, 947 F. 2d 1356, 1359 (9th cir. 1991), as it is clearly contrary to this Court's decision in *Dole v. United Steelworkers of America*, 494 U.S. 26, 33(1990) which held tax forms were typical information requests subject to the protection of the Paperwork Reduction Act of then 1980.

OPINIONS BELOW

The decision of the United States Tax Court was entered May 1, 2006. The Panel decision was entered August 23, 2007.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was final August 23, 2007.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

At issue 44 U.S.C. 3501 et seq and penalties and interest claims pursuant to 26 U.S.C. §§ 6651(a)(1) and 6654(a).

STATEMENT OF THE CASE

On April 5, 2005, Respondent subjected Petitioner to claims of penalties and interest for failing to provide income tax information on or before April 15, 2003 for the Calender year 2002 on request for income information form 1040 with OMB # 1545-0074.

Petitioner timely Petitioned the Tax Court raising a defense during the administrative process and any judicial action applicable thereto seeking protection from the interest and penalty claims of Respondent based upon the undeniable fact the request Form 1040 does not comply with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512.

Petitioner's defense also drew attention to the undisputed fact that no where in the Internal Revenue Code did Congress provide an exempt amount adjusted according to 26 U.S.C. § 151(d) which any determination under 6012 would need be based.

Between 26 U.S.C. § 6012's defects for calender year 2002 regarding § 151(d) and § 6011's failure to bring into compliance any request for income information adhering to the Paperwork Reduction Act of 1995, Petitioner sought protection.

Respondent claimed the exempt amount for section 6012 was not required to be written by Congress and the Form 1040 did not need comply with the Paperwork Reduction Act of 1995 citing to the mandate by statute, not by regulation theory discussed in *United States v. Hicks*, 947 F. 2d 1356, 1359 (9th cir. 1991) wherein the 9th Circuit rejected this Court's holding to the contrary in *Dole v. United Steelworkers of*

America, 494 U.S. 26, 33(1990)

The Tax Court held Hicks controls and the IRS is exempt from the Paperwork Reduction Act of 1995[1] and imposed the penalties and interest Respondent subjected Petitioner to in its Notice of Deficiency.

Petitioner appealed and a panel of the 9th Circuit affirmed citing to its holding in *United States* v. *Hicks*, 947 F. 2d 1356, 1359 (9th cir. 1991).

This Writ of Certiorari follows.

ARGUMENT SUPPORTING GRANTING OF WRIT

1 The dully enacted Paperwork Reduction Act of both 1980 and as strengthened, the 1995 Paperwork Reduction Act, and all of its protections for the public, apply to the Secretary's request for income tax information promulgated through request Form 1040 for year ending 2002 as held in *Dole v. United Steelworkers of America*, 494 U.S. 26, 33(1990) and contrary to the discussion in *United States* v. *Hicks*, 947 F. 2d 1356, 1359 (9th cir. 1991).

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[1]Even though Hicks was based upon the 1980 version of the PRA.

The Tax Court, Respondent, and United States Court of Appeals for the 9th Circuit have decided to dangerously oppose this Court's decision in *Dole v. United Steelworkers of America*, 494 U.S. 26, 33(1990) which held tax forms were "typical information collection requests" subject to the protection of the Paperwork Reduction Act of 1980.

The 1040 "instruction booklet" for 2002 says to Petitioner "You are not required to provide information on an information request form subject to the Paperwork Reduction Act unless the form displays a valid OMB control number."

At issue here is the meaning and application of the Paperwork Reduction Act of 1995 and whether the protection provided the public by Congress therein under 44 U.S.C. §3512 applies to penalties and interest Respondent subjected Petitioner to by way of its Notice of Deficiency dated April 5, 2005.

Congress defined penalty at 44 U.S.C. §3502(14) (1995) to mean "the imposition by an agency or court of a fine or other punishment; a judgment for monetary damages or equitable relief..."

The 1995 Paperwork Reduction Act was enacted to strengthen the 1980 Act at issue in *Dole*. The 1995 Act mandates:

> (a) Notwithstanding any other provision of law, **no person shall be subject to any penalty** for failing **to comply with a collection** of information that is subject to this subchapter if
>
> > (1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or
> >
> > (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) **The protection provided by this section may be raised** in the form of a complete defense, bar, or otherwise **at any time during the agency administrative process or judicial action applicable thereto.**

See 44 U.S.C. § 3512. See also, *Pond v. CIR*, T.C. Memo 2005-255, WL 18928 decided 10911-02 (10th.1-4-07)(unpublished); See also *U.S.v. Chisum*, 06-7082, decided September 25, 2007 (published).

The Supreme Court in *Dole* said that "While the grammar of this text can be faulted, its meaning is clear: the public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency."*Dole* at 40

The changes to the public protection provision in 1995 removed "fails to maintain and provide" and added "fails to comply..."

26 U.S.C. § 6011 says:

> "When required by regulation prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement **according to the forms and regulations** prescribed by the Secretary."

In U.S. v. Hicks, 947 F. 2d 1356, 1359 (9th cir. 1991) created the mandate by statute override to the public protection provision which reads "notwithstanding any other provision of law, no person shall be subject to any penalty...".

In *U.S. v. Collins*, 920 F.2d 619, 630-31 the 10th Circuit stated:

> "In *United States v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was obligatory. **This holding is superseded by the Supreme Court's analysis in Dole v. United Steelworkers, ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which**

included federal income tax forms within the category of information collection requests under the Act. Dole would also appear to call into question the holdings in *Snyder v. IRS*, 596 F. Supp. 240 (N.D.Ind. 1984) and *Cameron v. IRS*, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS forms. However, Dole does not contravene our recent holding in Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii)"

The 10th Circuit recently rendered its to be "published" decision in *U.S.v. Chisum*, 06-7082, decided September 25, 2007, where the Panel[2] addressed whether the Paperwork Reduction Act reached the making of false statements by

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[2]Same Panel who wrote the unpublished decision in Pond on January 4, 2007 cited above.

saying:

> C. The Paperwork Reduction Act (PRA)
>
> The PRA, 44 U.S.C. § 3501-20, precludes the imposition of any penalty against a person for "failing to comply with a collection of information" if either (1) it "does not display a valid control number" or (2) the agency fails to alert the person that he or she "is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). A § 3512(a) defense may be raised at any time. See id. § 3512(b). Tax forms are covered by the PRA. See Dole v. United Steelworkers of Am., 494 U.S. 26, 33 (1990).
>
> Mr. Chisum contends that "[s]ince there was no proof that Form 1040 was a lawful form under the [PRA], the trial court erred in failing to grant [his] request [at the sentencing hearing] to dismiss the indictment." Aplt. Br. at 29. But the PRA protects a person only "for failing to file information. It does not protect one who files information which is false."

> Collins, 920 F.2d at 630 n.13 (internal quotation marks omitted). The charges against Mr. Chisum were predicated on the filing of false information, not the failure to file. He is therefore not entitled to relief.

Chisum, pg 12

The *Collins* footnote referred to in the Panel decision in *Chisum* states:

> "In *United States* v. *Weiss*, 914 F.2d 1514, 1520-22 (2d Cir. 1990), the Second Circuit held that the Paperwork Reduction Act did not preclude prosecution for filing false medicare and Medicaid claims, despite the fact that the forms in question did not contain OMB control numbers. Distinguishing Smith, where defendants were prosecuted for failure to file a Plan of Operations with the Forest Service, the Second Circuit reasoned that the Act "`only protects a person from penalties for failing to files information It does not protect one who files information which is false.'" Id. at 1522 (quoting Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law,

> 24 Harv.J. on Legis. 1, 77 n. 411 (1987)) (emphasis in original). We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information. Had defendant's tax evasion been effectuated through the filing of falsified tax returns, Weiss would dictate that no Paperwork Reduction Defense would be available to him. But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to pay taxes, and **defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct**."

Yet, the Government argues and the Tax Court and Panel accepted the position that because of the discussion by the 9th Circuit in Hicks, which was a criminal case, that such a discussion renders this Court's "holding" in Dole moot. The Government and Courts are simply overlooking the phrase judicial action in section 3512 as well as the term "penalty" defined at

3502(14)(1995).

In *U.S. v. Bentson*, 947 F.2d 1353 (9th Cir. 1991), decided the same day as *Hicks*, the 9th Circuit "held that the public protection provision of the PRA, 44 U.S.C. § 3512, constitutes no defense to prosecution under 26 U.S.C. § 7203. Bentson's PRA argument is essentially the same as the argument we rejected in Hicks, and we find no merit in it." *Bentson*, at 1355. The *Bentson* Court discussed what Mr. Bentson pointed out with the 10th Circuit's decision in *United States v. Collins*, 920 F.2d 619, 630-31, fn. 12-13 (10th Cir. 1990), which suggested "that persons charged with criminal violations of the Internal Revenue Code might in some circumstances legitimately raise a PRA defense. For reasons given in *Hicks*, the Bentson Court stated they "believe that the PRA was not intended to provide such a defense, and therefore we disagree with the Collins court's dicta." *Bentson*, at 1355

Except for 1995 when the Government shut

down, the IRS application each year for approval or an amended application each year, must ask permission to request income tax information from the public. Since at least 1995, Congress, at 44 U.S.C. §3506(c)(1)(B) directs the Director of OMB to "ensure" the IRS application's attached proposed request for income tax information form displays the following criteria:

> (i) inventoried, displays a control number and, if appropriate, an expiration date;
>
> (ii) indicate the collection is in accordance with the clearance requirements of section 3507; and;
>
> (iii) informs the person receiving the collection of information of;
>
> > (I) the reasons the information is being collected;
> >
> > (II) the way such information is to be used;
> >
> > (III) an estimate, to the extent practicable, of the burden of the collection;

(IV) whether the responses to the collection of information are voluntary, required to obtain a benefit, or mandatory; and

(V) the fact that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number[3]

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[3]P.L. 104-13(1995), pg. 206-207 USCCAN- 1. "Section 3506(c) mandates a detailed information collection evaluation procedure requiring each agency to establish a process within the office designated under subsection (a), independent of program responsibility, to evaluate proposed collections. This office must: Review a collection of information before it is submitted to OMB for review, that includes making an independent evaluation of its need; preparing a description of it, a collection plan, and a burden estimate; pilot testing the collection, if appropriate; and developing a plan for the management and use of the information to be collected; Ensure that information collections are inventoried, display a control number and, when appropriate, an expiration date; indicate the collection is in accordance with the Act; and contain a statement informing the person being asked why the information is being collected, its use, its burden, and whether responses are voluntary, required to obtain a benefit, or mandatory. This requirement is transposed from current law (section 3504(c)(3)) to make it more

See 3506(c)(1)(B)(1995)

Certification is also required by the Internal Revenue Service to show compliance with 44 U.S.C. §§§ 3506,3507 and 3512, along with OMB regulations at 5 CFR 1320.8(b)(3) to which each "certification" falsely states compliance with the list at 3506.

The Tax Court and 9th Circuit are simply in gross error in refusing to even acknowledge let alone enforce the holding this Court set forth in Dole that is forms such as the 1040 are subject to the public protection provision of 44 U.S.C. § 3512(a)(1995).

2. The request for income tax information 1040 for 2002 does not comply with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512(a)(1995) nor does it contain what is set forth in 5 CFR 1320.8(b)(3)?

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clearly an agency responsibility, rather than a duty of OMB. Note that this requirement must also be certified to by each agency (see section 3506(c)(3)(F); and Assess the information collection burden of proposed legislation affecting the agency."

It is clear to anyone looking at the request Form 1040 for 2002 that it does not contain the list set out in 44 U.S.C. 3506(c)(1)(B) nor does it comply with 5 CFR 1320.8(b)(3). It simply does not contain even the basic of warning Congress demanded at 44 U.S.C. § 3512(a) and 3506(c)(1)(B)(iii)(V).

It is equally clear that "no person shall be subject to any penalty" unless the form does display a "valid OMB control number" "issued in accordance with this subchapter." See 3512(a)(1)(1995) Form 1040 is not in accordance with §§§3506, 3507 or 3512 and the Government does not dispute this fact.

The Government simply argues and the Court seams ready to accept the statutory origin theory is the basis for claiming "the filing of a tax return is required by statute, not regulation." See *Hicks*, supra

Petitioner has no difficulty putting away the

mandate by statute theory referencing first to the *Dole* Court saying "tax forms" were "typical information collection requests" subject to the PRA (of 1980), id. at 32-33; then Supreme Court in *CIR v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944) stated "Congress has given discretion to the Commissioner to prescribe **by regulation forms** of returns and has made it the duty of the taxpayer to comply." The Supreme Court also in 2000 restated its conclusion in *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) that "incriminating evidence may be the by-product of obedience to a ***regulatory requirement***, such as filing an income tax return,.."

The Supreme Court also, when announcing the exception to the general definition of willfulness in criminal tax cases, said the "proliferation of statutes **and regulations** has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax

laws." *Cheek* v. *U.S.*, 498 U.S. 192, 199-200 (1991); See also *U.S.* v. *Mersky*, 361 U.S. 431, 437 (1960)("An administrative regulation, of course, is not a 'statute.'")

The D.C. Circuit in *Saco River Cellular, Inc.* v. *FCC*, 133 F.3d 25, 31 (D.C. Cir. 1998) held the protection provided by section 3512 precluded by "5 C.F.R. 1320.6(e)" "'does not extend to situations in which a statute authorizes, or directs, an agency to impose a collection of information on persons, and the agency does so.' Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30438, 30441 (1995)."

OMB cites to section 6011 which begins "When required by regulation prescribed by the Secretary any person made liable..." The Commissioner even cites to and "their regulations" when discussing the topic with the public. The 9th Circuit explained *Hicks* was

confused between law and regulation and said:

> "It confuses law with regulations with respect to such law. It is the tax code itself, without reference to regulations, that imposes the duty to file a tax return. See *United States* v. *Bowers*, 920 F.2d 220, 222 (4th Cir. 1990) (upholding defendants' conviction under 26 U.S.C. § 7201). **However, even if we suppose that the duty to file tax returns can be understood only with reference to regulations, the IRS has duly promulgated sufficient regulations, e.g., 26 C.F.R. §§ 1.6011-1, 1.6012-1, to make that duty clear**. The meaning of 'willful failure to make a tax return' is apparent without reference to the contents of Form 1040 or its instructions."

There is no question that at best the requirement to answer the questions requested by the IRS can only be understood by reference to those questions. Those questions appear only on Form 1040 as a typical request for information. *Dole*, supra The questions which are contained within the Form 1040, do not appear in any code

provision written by Congress. This is why the IRS is required to follow the Paperwork Reduction Act application format which has a place for the IRS to inform OMB which statutory provisions they are seeking to enforce through their submission for approval of their request for information form.

On April 10, 2006, Chief Counsel for the IRS issued Revenue Ruling 2006-21 which cited to the 1980 Paperwork Reduction Act instead of the 1995 Act. The words when quoting the Act were clearly out of the 1980 Act as if the IRS refuses to acknowledge the passage of the 1995 Paperwork Reduction Act.

While addressing the reasons for the changes between the 1980 and 1995 Paperwork Reduction Acts, Congress said in its Legislative History of the 1995 PRA and its purpose for amending the 1980 PRA was to clarify that it originally was enacted to among other things, "eliminate exemptions" for the "Internal Revenue Service". *House Report, 104-13, [page 8] at 171*

(1995). App. 95 The only reason it was modified to add certain terms was to maintain consistency and clarity and to "**unequivocally cover all collections of information**." *House R. [page 54] at 217. (Emphasis added).* App.101

It is worth noting that the 1980 language of the public protection provided in section 3512 was that "no person shall be subject to any penalty for failure to maintain or provide information..." while the 1995 language says "no person shall be subject to any penalty for failure to comply with a collection of information...." Failure to maintain or provide seems more limited in scope and failure to comply seems to cover ever conceivable usage of a request for information or information obtained. Simply, if the request is out of compliance with the law, then anything obtained with that bootleg request is void. See *Dole*, 494 U.S.43 (1990)[(fn.6) Page 40 See id., at 20 (The Act "allow[s] the public, by refusing to answer these [information collection

requests], to help control `outlaw forms'")].

Likewise, the above referenced page in the "instruction booklets" for 2002 which contain the words "you are not required to provide information...." continue to this day to reference the Paperwork Reduction Act of 1980 instead of the Paperwork Reduction Act of 1995.

The Form 1040 does not comply with the most basic of rules set forth by Congress in the Paperwork Reduction Act of both 1980 and 1995. The requirements are mandated because most of the public does not understand the usage of information and how it is shared and in order for each person to intelligently police their rights regarding such information all requests must display compliance with the Paperwork Reduction Act. The rule of law, rule of uniformity, and rule of common sense, say that a person should not be required to answer any questions posed upon it by its Government unless and until a full disclosure has occurred with regard to why the information is

being sought, how the answers will be used, whether response is optional or not, if not why not, and the fact that an agency may not conduct or sponsor a collection of information and a person cannot be subject to any penalty for failure to answer questions unless the request form displays a valid OMB control number issued in accordance with the Paperwork Reduction Act of 1995.

CONCLUSION

Todd Guthrie requests this Court issue Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the two issues raised herein and for the purpose of reversing the decision by the United States Tax Court in regard to interest and penalties along with directing the Ninth Circuit that the *Hicks* and *Bentson* decision in 1991 are in opposition to this Court's *Dole* decision in 1990 .

Respectfully Submitted

11/19/07 /s/ Todd Guthrie

T.C. Memo. 2006-89
UNITED STATES TAX COURT

TODD B. GUTHRIE,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 12148-05. Filed May 1, 2006.

Todd B. Guthrie, pro se.

David W. Sorensen, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

FOLEY, Judge: By notice dated April 5, 2005, respondent determined a deficiency in and additions to petitioner's 2002 Federal income tax. The issues for decision are whether [page

2]petitioner is liable for tax relating to unreported income and for the section 6651(a)(1)1 and 6654(a) additions to tax.

FINDINGS OF FACT

Petitioner is a licensed orthopedic physician. During 2002, petitioner rendered services to Park Ridge Orthopedics, P.A., a professional medical corporation, in exchange for $255,769. Mountain Health Care, P.A., also paid petitioner $54,950 for his medical services. In addition, petitioner received $79,100 of rent, $3,601 of interest, and $150 of dividends.

Petitioner did not file a tax return or pay estimated taxes relating to 2002. As a result, respondent issued a notice of deficiency on April 5, 2005. Respondent determined that petitioner was liable for a $127,490 deficiency in income tax, a $28,685 section 6651(a)(1)[1] addition to tax

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of

for failure to file a return, a $13,386 section 6651(a)(2) addition to tax for failure to timely pay, and a $4,260 section 6654(a) addition to tax for failure to pay estimated taxes. On July 1, 2005, petitioner, while residing in Reno, Nevada, filed his petition.

At trial, on January 30, 2006, respondent [page 3] conceded the section 6651(a)(2) addition to tax and moved for the imposition of a section 6673 penalty.

OPINION

Petitioner concedes that he received income, failed to file a return, and failed to pay estimated taxes relating to 2002. Petitioner contends that the income he received does not exceed the exemption amount set forth in section 151(b), he is not required to file a return, and he is not liable for the deficiency or the additions to tax. We sustain respondent's

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Practice and Procedure.

determinations. The income petitioner received was taxable, and he was required to file a return. See secs. 61(a), 6012(a).

In addition, respondent bears, and has met, the burden of production with respect to the section 6651(a)(1) and 6654(a) additions to tax. See sec. 7491(c); Rule 142(a). Furthermore, petitioner does not meet the requirements of any exception to section 6651(a)(1) or 6654(a). See Higbee v. Commissioner, 116 T.C. 438, 446 (2001).

Respondent has moved, pursuant to section 6673(a), to impose sanctions. Section 6673(a) authorizes this Court to impose a penalty in favor of the United States in an amount not to exceed $25,000 whenever it appears that the taxpayer's position is frivolous, groundless, or instituted primarily for delay. See sec. 6673(a)(1)(A) and (B). Included among petitioner's contentions was a legitimate concern regarding the imposition of [page 4]a section 6651(a)(2) addition to tax. Thus, it would be inappropriate to impose a section 6673 penalty. Nevertheless, we admonish petitioner that he may be subject to a section

6673 penalty if he asserts frivolous or groundless contentions in a subsequent proceeding in this Court. Contentions we have not addressed are irrelevant, moot, or meritless.

To reflect the foregoing,

An appropriate order and

decision will be entered.

UNITED STATES TAX COURT

WASHINGTON, DC 20217

TODD B. GUTHRIE,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No. 12148-05
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent	)	

ORDER AND DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion (T.C. Memo. 2006-89) filed May 1, 2006, it is

ORDERED that respondent's motion to impose sanctions pursuant to I.R.C. § 6673, filed January 30, 2006, is denied. It is further

ORDERED AND DECIDED that petitioner is liable for a $127,490 deficiency in income tax, a $28,685 addition to tax, pursuant to Internal Revenue Code section 6651(a)(1), and a $4,260

addition to tax, pursuant to Internal Revenue Code section 6654(a), for the taxable year 2002.

(signed) Maurice B. Foley
Maurice B. Foley
Judge

ENTERED:

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 06-73680

TODD B. GUTHRIE,

Petitioner,

FILEDAUG 23 2007
CATHYA. CATTERSON,
CLERK U.S. Court of
Appeals for 9th Circuit

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Tax Ct. No. 12148-05

MEMORANDUM

Appeal from a Decision of the United States Tax Court

Submitted August 13, 2007[1][2]

Before: KLEINFELD, SILVERMAN, and M. SMITH, Circuit Judges.

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[1]This disposition is not appropriate for publication and is notprecedent except as provided by 9th Cir. R. 36-3.

[2]The panel unanimously finds this case suitable for decision withoutoral argument. *See* Fed. R. App. P. 34(a)(2)

Todd B. Guthrie, a licensed physician, appeals pro se from the tax court's decision upholding a deficiency determination after Guthrie failed to file a tax return for tax year 2002. We have jurisdiction under 26 U.S.C. § 7482. We review a tax court'Xs legal conclusions de novo and its findings of fact for clear error. *Charlotte'Xs Office Boutique, Inc. v. Comm'Xr*, 425 F.3d 1203, 1211 (9th Cir. 2005). We affirm.

The tax court properly upheld the deficiency determination based on the Form 4340 for the year in question because Guthrie failed to present any evidence rebutting the presumption of its correctness. *See Hughes v. United States*, 953 F.2d 531, 535 (9th Cir. 1992).

We reject Guthrie's contention that he was excused from filing a tax return on the ground that 26 U.S.C. § 151(d) sets forth the amount of a personal exemption as a formula rather than a fixed amount, because this argument does not

undercut his obligation to use the formula to determine the amount of taxes owed. *See* 26 U.S.C. § 1 (setting forth basic tax rates for every income level); *see also* 26 U.S.C. § 6011 (requiring individuals liable for tax to provide a return).

We also reject Guthrie's contention that the Paperwork Reduction Act ("PRA") excuses him from filing a tax return on the ground that the Form 1040 for 2002 allegedly lacked a valid control number. *See United States v. Hicks*, 947 F.2d 1356, 1359-60 (9th Cir. 1991) (rejecting taxpayer's assertion that Form 1040's failure to comply with the PRA due to lack of a valid control number [page 2] excused his failure to file tax return). Guthrie'Xs remaining contentions are alsounpersuasive.

All pending motions are denied.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TODD B. GUTHRIE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 06-73680
Tax Court No. 12148-05

JUDGMENT

Upon Petition to Review a Decision of the United States Tax Court

This cause came on to be heard on the Transcript of the Record from the United States Tax Court and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the United States Tax Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Thursday, August 23, 2007

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(2)

No. 07-694

In the

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FEB 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

Todd Guthrie

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Ninth Circuit

PETITION FOR REHEARING

Todd Guthrie
1434 Ayer Lane
Mt. Shasta, CA 96067

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1. The U.S. is subjecting members of the public to penalties for failure to provide answers to questions made by Form such as the 1040, failing to inform members of the public with their questions, the reasons the questions are being asked, the way the answers given are intended to be used, and this Court should rehear this matter and settle the division of the Circuits caused by the U.S. non unified position in favor of this Court's long standing position that tax forms are subject to the same public protections Congress directs all requests to be subjected to in the same way questions would be treated if they were being asked orally by the Agency. 3

2. Rehearing by this Court should be granted because until this Court fixes the division of the Circuits caused by this Court's Dole decision, the public will continue to lose their right to vote, hold property, petition for redress, and freely speak, all penalties to which the Paperwork Reduction Act was enacted to prohibit. 13

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INTRODUCTION

Petitioner asks this Court to reconsider the holding in *Dole v. United Steelworkers*, 494 U.S. 26,33 (1990) that typical information collection requests are tax forms such as the 1040 and reaffirm this holding applies to the Paperwork Reduction Act of 1995 as it did the Act of 1980. Since holding tax forms are subject to the public protection, 44 U.S.C. § 3512(1980), a division of the U.S. Circuit Courts and Tax Court has appeared, both directly after the Dole decision, and now this division has grown to such proportions that the Department of Justice is promoting the divided authority as a green light to continue to disregard Congress and its mandate that all persons are to be told, before they have to answer any questions, orally or in writing, advanced by any Agency, including the Internal Revenue Service, why the Agency is requesting the information sought on their form, how the answers to those questions are intended

to be used, whether the target's response is voluntary or mandatory, and the fact no person is required to answer any question unless the form of questions displays compliance with the Paperwork Reduction Act of 1995(during Dole, 1980).

Even if this Court is unwilling to consider the affect the Paperwork Reduction Act of 1995 has on its 1990 Dole decision, which Congress said was intended to overturn the Dole decision in regard to third party requests not being covered by the 1980 Act's public protection, the fundamental principal that no person should be required to provide answers to questions until that person fully understands the conditions which attach to the usage of those answers must be addressed because there is no way a person can know whether to claim the protection of the Fifth Amendment until such time as the Agency seeking the information has fully disclosed its intentions for the information it seeks.

1. The U.S., in subjecting members of the public to penalties for failure to provide answers to questions made by Form such as the 1040, fail to inform members of the public with their questions, the reasons the questions are being asked, the way the answers given are intended to be used, and this Court should rehear this matter and settle the division of the Circuits caused by the U.S. non unified position in favor of this Court's long standing position that tax forms are subject to the same public protections Congress directs all requests to be subjected to in the same way questions would be treated if they were being asked orally by the Agency.

On November 14, 2007, the 7th Circuit Court of Appeals issued its decision in U.S. v. Denny R. Patridge, case number 06-3635.In its consolidated decision, the 7th Circuit stated it was reaffirming its decision in *Salberg v. U.S.*, 969 F.2d 379, 384 (1991), which held the "obligation to file a tax return stems from 26 U.S.C. § 7203, not from any agency's demand. The Paperwork Reduction Act does not repeal § 7203."

The 9th Circuit in U.S. v. Priest, et al., 06-10438, decided July 5, 2007, likewise concluded that the 1995 PRA "does not limit the impact of Hicks (947 F. 2d 1356, 1359-60) because we there held that 'repeals by implication are not favored.'"

The 7th and 9th Circuit's decision are contrary to this Court's holding in *CIR v. Lane Wells Co.* 321, U.S. 219, 223 (1944) that "Congress has given discretion to the Commissioner to prescribe by regulations forms of returns and made it the duty of the taxpayer to comply."

The 7th and 9th Circuit opinions also are contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26, 33 (1990) which held "typical information collection requests include tax forms" and that the public is to be protected.

The 7th and 9th Circuit's opinion is also contrary to this Court's decision in *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) which held "incriminating evidence may be the by-product of obedience to a regulatory requirement."

The decision by the 7th and 9th Circuits completely rejected the direct words of the Paperwork Reduction Act of 1980 and 1995 which both begin at section 3512 "Not withstanding any other provision of law no person shall be subject to any penalty..." The 7th Circuit admits the term "return" is not defined by any Act of Congress and ignores the logical follow that is the request derives from regulations.

The 7th Circuit takes the leap by saying they have "no doubt that the IRS has complied with the Paperwork Reduction Act." "The control number on Form 1040 appears on OMB's web site as a current, valid number; if this is wrong, it takes more than a lawyer's say-so to establish the proposition."

The 7th Circuit's position is contrary to the direct language of the Paperwork Reduction Act of 1995 as well as this Court's decision in Dole. The 1995 Act directs a "complete defense, bar, or otherwise" may be raised at any time. The

protection would begin upon either a person's "say-so" or upon an Attorney claiming the protection for his client. Look at how the 7th Circuit handled the issue.

It threatened disbarment of the Patridge Attorney for raising the protection. There is no doubt the Form 1040 fails to contain any of the listed criteria promulgated by Congress at 44 U.S.C. § 3506(c)(1)(B)(1995) which among other things directs the Agency to inform the target the reason why the questions are being asked and how the information is to be used. Issues the Patridge Panel completely ignored.

See also 5 U.S.C. §552(a) where Congress requires the same list of disclosure for the IRS as section 3506(c)(1)(B) of Title 44.

This Court said in Dole:

> "While the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in

> compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency. **By its very terms, the statute's enforcement mechanism** does not apply to rules which require disclosure to a third party rather than to a federal agency." Id. at 40

Furthermore, the Patridge panel said "How any of this could block a conviction for tax evasion is a mystery."

The 10th Circuit has steadfastly remained[1] a strong proponent of the Dole holding with their most recent deposit on the reach of protection for the public in *USA v. Chisum*, 06-7082 at 12 (slip op.)(decided 9-26-07)(10th Cir.)

In 2007, the Chisum Panel held:

C. The Paperwork Reduction Act (PRA)

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[1]Petitioner understands thus far the Tenth Circuit has actually given no relief under the 1980 or 1995 Act while they continue to direct where and when such relief is to be given.

The PRA, 44 U.S.C. § 3501-20, precludes the imposition of any penalty against a person for "failing to comply with a collection of information" if either (1) it "does not display a valid control number" or (2) the agency fails to alert the person that he or she "is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). A § 3512(a) defense may be raised at any time. See id. § 3512(b). Tax forms are covered by the PRA. See Dole v. United Steelworkers of Am., 494 U.S. 26, 33 (1990).

Mr. Chisum contends that "[s]ince there was no proof that Form 1040 was a lawful form under the [PRA], the trial court erred in failing to grant [his] request [at the sentencing hearing] to dismiss the indictment." Aplt. Br. at 29. But the PRA protects a person only "for failing to file information. It does not protect one who files information which is false." Collins, 920 F.2d at 630 n.13 (internal quotation marks omitted). The charges against Mr. Chisum were predicated on the filing of false information, not the failure to file. He

is therefore not entitled to relief.

In *U.S. v. Collins*, 920 F.2d 619 (10th Cir. 1990) the 10th Circuit, prior to the 7th Circuit's decision in Salberg, stated

> [fn12]In *U.S. v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was obligatory. **This holding[2] is superseded by the Supreme Court's analysis in Dole v. United Steelworkers,** ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection reque: under the Act. Dole would also appear to call into question the holdings in Snyder v. IRS, 596 F. Supp. 240 (N.D.Ind. 1984) and Cameron v. IRS, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS

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[2]No doubt Dole is a "Holding."

forms. However, Dole does not contravene our recent holding in Lonsdale v. U.S., 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii).

[fn13] In U.S. v. Weiss, 914 F.2d 1514, 1520-22 (2d Cir. 1990), the Second Circuit held that the Paperwork Reduction Act did not preclude prosecution for filing false medicare and Medicaid claims, despite the fact that the forms in question did not contain OMB control numbers. Distinguishing Smith, where defendants were prosecuted for failure to file a Plan of Operations with the Forest Service, the Second Circuit reasoned that the Act "`only protects a person from penalties for failing to files information It does not protect one who files information which is false.'" Id. at 1522 (quoting Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv.J. on Legis. 1, 77 n. 411 (1987))

> (emphasis in original). We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information. Had defendant's tax evasion been effectuated through the filing of falsified tax returns, Weiss would dictate that no Paperwork Reduction Defense would be available to him. **But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct.** Emphasis added.

Petitioner claims the Chisum Panel[3] is partly incorrect. The Chisum Panel nine months earlier held in *Pond v. CIR*, T.C. Memo 2005-255 WL 18928, decided January 4, 2007, Tax Court was wrong for directing Pond, by raising a defense against penalty and interest claims of the Secretary, he was acting in a frivolous manner.

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[3]Same 10th Circuit but different Judges.

The 7th Circuit in Patridge says it cannot understand how "tax evasion" and the public protection provision of the Paperwork Reduction Act are connected, describing this as a "mystery" while the 10th Circuit says Forms like the 1040 are "inexorably linked to the statutory requirement to pay taxes..." Collins, fn13, Chisum, pg. 12

The 1980 Act at issue in Collins and Dole protected the public from penalties for failing to maintain or provide information while the 1995 Act protects the public from failing to comply with a collection of information. The 1995 Act also says the OMB number must be issued in "accordance with this chapter" and defense, bar or otherwise, can be raised at any time.

Simply, the decisions show why this Court needs to address the reach of the public protection provided by Congress to the entire Country at 44 U.S.C. § 3512(a)(1995).

Then there is the Tax Court's refusal to accept the 10th Circuit's decision in Pond v. CIR.

See *Wolcott v. CIR*, T.C. Memo. 2007-315. (fn.8)

The relationship between Government and the Public involving gathering information and usage of same is in need of specific uniform enforcement, and to which blatant error of Constitutional proportion exists in the refusal of the U.S. Department of Justice, Commissioner of I.R.S., U.S. Tax Court and the several U.S. Court of Appeals, in rejecting both the law, history and decisions governing the Paperwork Work Reduction Act of both 1980,1995, and the reasons both acts arose in the first place. With many violations comes many cases which can be prevented by granting this Petition for rehearing.

2. Rehearing by this Court should be granted because until this Court fixes the division of the Circuits caused by this Court's Dole decision, the public will continue to lose their right to vote, hold property, petition for redress, and freely speak, all penalties to which the Paperwork Reduction Act was enacted to prohibit from being confiscated from any member of the public.

The 7th Circuit says the requirement to answer questions on Form 1040 comes from 26 U.S.C. § 7203 in both Patridge and Salberg. Section 7203 is a criminal provision. This makes the 7th Circuit's theory that the IRS, by asking the public to answer their questions on the 1040, not only is the IRS conducting an investigation with the 1040, but a criminal investigation at that.

In *Pennsylvania* v. *Muniz*, 496 U.S. 582, 596 (1990) this Court explored short of the "outer boundaries of what is 'testimonial'" and that the protection primarily was to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality..." *Ullmann* v. *U.S.*, 350 U.S. 422, 428 (1956) This Court went on to say "it is evident that a suspect is 'compelled . . . to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma[4] - either during a criminal trial where a

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[4]cruel trilemma means self-accusation, perjury or contempt, defining the operation of the

sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in Miranda, the choices are analogous and hence raise similar concerns." Id.

In *Colorado v. Spring*, 479 U.S. 564 (1987) this Court compared the "right to refuse to answer any question which might incriminate," citing *U.S. v. Washington*, 431 U.S. 181, 188 (1977) and directed it was "self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." Ibid.

There, It was said a "valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.' *Moran v. Burbine*, 475 U.S., at 422. This

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Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.

Court has "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Colorado at 577 In regard to an Agency request for information, Congress has made this requirement through the Paperwork Reduction Act of both 1980 and 1995 very clear.

If a Federal Agency refuses to tell a person why they are asking questions of any citizen or group of citizens and how that agency intends to use those answers, the only choice remaining for members of the pubic is the act of remaining silent without threat or being "subject" to any penalty.

In *U.S. v. Dawes*, 951 F.2d 1189 (fn.2)(10th Cir. 1991), the 10th Circuit reported on the troubling aspect of not enforcing the Paperwork Reduction Act in a unified manner, the Court stated:

> "In response to a question from the court during oral argument, counsel for the government indicated that the government did not have a unified federal position regarding this issue. Given the fact that the issue is one of national scope which affects the tax revenues of the U.S., we find this posture regrettable."

The same problem exists today as depending on which Circuit you live in determines whether you can be penalized for remaining silent or not.

In *Garner v. U.S.*, 424 U.S. 648 (1976) this Court started with "the fundamental proposition:

> A witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." quoting *Kastigar v. U.S.*, 406 U.S. 441 (1972).

Id. at 656

The Court has held that an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege. *U.S. v. Kordel*, 397 U.S. 1, 7-10 (1970).

Given the evidence the U.S. is refusing to recognize or direct compliance with the 1995 Paperwork Reduction Act, continuing to emphasize the Paperwork Reduction Act of 1980 instead, and that a deep divide exists between the 7th Circuit in Patridge and Salberg with the 10th Circuit in Collins, Dawes, Pond and Chisum, as well as the Tax Court's public display of defiance to the 10th Circuits Pond decision it reported in Wolcott, as well as such blatant defiance by the 7th Circuit and Tax Court for this Court's decision in Dole and Congressional mandates within the Paperwork Reduction Act of 1995, should compel this Court to rehear the matters in this case.

CONCLUSION

For the foregoing reasons Petitioner asks this Court to Grant his Petition for Rehearing.

Respectfully Submitted

2-3-08 /s/Todd Guthrie

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Petition for Rehearing is presented in good faith and not for the purpose of any delay, whatsoever, and is limited to substantial and controlling issues involving recent decisions by the 7th, 9th and 10th Circuit, which divide this nation on the application and reach of the Paperwork Reduction Act of 1995 and the fifth amendment tones remaining silent may trigger only strengthening why this Court should Grand this Petition for Rehearing.

/s/Todd Guthrie